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10 || *Attorneys for Plaintiff and the Proposed Class*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO / OAKLAND DIVISION

15 KENNETH MILLS, on behalf of himself  
and all others similarly situated,

Case No. 3:12-cv-04010-MEJ

Plaintiff,

V.

HSBC BANK NEVADA, N.A.; HSBC CARD SERVICES, INC.; HSBC MORTGAGE SERVICES, INC.; HSBC AUTO FINANCE, INC.; and HSBC CONSUMER LENDING (USA), INC..

## Defendants.

**FIRST AMENDED CLASS ACTION  
COMPLAINT FOR DAMAGES AND  
INJUNCTIVE RELIEF PURSUANT TO 47  
U.S.C. § 227 ET SEQ. (TELEPHONE  
CONSUMER PROTECTION ACT)**

## CLASS ACTION

**DEMAND FOR JURY TRIAL**

1 Plaintiff Kenneth Mills (hereinafter referred to as "Plaintiff"), individually and on  
 2 behalf of all others similarly situated, alleges on personal knowledge, investigation of his counsel,  
 3 and on information and belief as follows:

4 **NATURE OF ACTION**

5 1. Plaintiff brings this action for damages, and other legal and equitable  
 6 remedies, resulting from the illegal actions of HSBC Bank Nevada, N.A., HSBC Card Services,  
 7 Inc., HSBC Mortgage Services, Inc., HSBC Auto Finance, Inc., HSBC Consumer Lending  
 8 (USA), Inc., and/or other affiliates or subsidiaries of HSBC Finance Corporation (all hereinafter  
 9 referred to collectively as "HSBC") in negligently, knowingly, and/or willfully contacting  
 10 Plaintiff and Class members on their cellular telephones without their prior express consent  
 11 within the meaning of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq.  
 12 (hereinafter referred to as the "TCPA"). HSBC has violated the TCPA by contacting Plaintiff  
 13 and Class members on their cellular telephones via an "automatic telephone dialing system," as  
 14 defined by 47 U.S.C. § 227(a)(1), and/or by using "an artificial or prerecorded voice" as  
 15 described in 47 U.S.C. § 227(b)(1)(A), without their prior express consent within the meaning  
 16 of the TCPA.

17 2. Plaintiff brings this action for injunctive relief and statutory damages  
 18 resulting from HSBC's illegal actions.

19 **JURISDICTION AND VENUE**

20 3. This matter in controversy exceeds \$5,000,000, as each member of the  
 21 proposed Class of tens of thousands is entitled to up to \$1,500.00 in statutory damages for each  
 22 call that has violated the TCPA. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C.  
 23 § 1332(d)(2). Further, Plaintiff alleges a national class, which will result in at least one Class  
 24 member belonging to a different state. Therefore, both elements of diversity jurisdiction under  
 25 the Class Action Fairness Act of 2005 ("CAFA") are present, and this Court has jurisdiction.  
 26 This Court also has federal question jurisdiction pursuant to 28 U.S.C. § 1331.

27 4. Venue is proper in the United States District Court for the Northern  
 28 District of California pursuant to 28 U.S.C. §§ 1391(b)-(c) and 1441(a), because Defendant is

1 deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time  
2 the action is commenced, and because Defendant's contacts with this District are sufficient to  
3 subject it to personal jurisdiction. Venue is also proper in this District because Plaintiff Mills  
4 has resided in this District at all times relevant to these claims such that a substantial part of the  
5 events giving rise to the claims occurred in this District.

## **PARTIES**

7                   5. Plaintiff Kenneth Mills is, and at all times mentioned herein was, an  
8 individual citizen of the State of California, who resides in Oakland, California.

9                   6.        Defendant HSBC Bank Nevada, N.A., is a national bank and a wholly  
10 owned subsidiary of HSBC Finance Corporation.  HSBC Bank Nevada, N.A. is a Nevada  
11 company with principal places of business in Las Vegas, Nevada and New York City, New  
12 York.

13                   7.        Defendant HSBC Card Services, Inc. is the U.S. consumer credit card  
14                   segment of HSBC. HSBC Card Services, Inc., is a Maryland company with a principal place of  
15                   business in Illinois.

16                   8.        Defendant HSBC Mortgage Services, Inc. offers HSBC home loans and  
17        other mortgages to consumers. HSBC Mortgage Services, Inc. is a Delaware company.

18                   9.        Defendant HSBC Auto Finance, Inc. offers auto loans to consumers.  
19        HSBC Auto Finance, Inc. is a Delaware company.

20                   10.     Defendant HSBC Consumer Lending (USA), Inc. offers consumers credit  
21     accounts and loans. HSBC Consumer Lending (USA), Inc. is a Delaware company.

22                   11.     HSBC markets itself as “one of the industry’s most valuable brands,” and  
23     “one of the world’s largest banking and financial services organisations [sic].” HSBC serves  
24     over 89 million customers across its Customer Groups and Global Businesses. It has offices in  
25     85 countries and territories.<sup>1</sup>

<sup>28</sup> <sup>1</sup> See <http://www.hsbc.com/1/2/investor-relations/overview/fast-facts>, last viewed on July 26, 2012.

**THE TELEPHONE CONSUMER PROTECTION ACT OF 1991****(TCPA), 47 U.S.C. § 227**

12. In 1991, Congress enacted the TCPA,<sup>2</sup> in response to a growing number  
3 of consumer complaints regarding certain telemarketing practices.

13. The TCPA regulates, among other things, the use of automated telephone  
6 equipment, or “autodialers.” Specifically, the plain language of section 227(b)(1)(A)(iii)  
7 prohibits the use of autodialers to make any call to a wireless number in the absence of an  
8 emergency or the prior express consent of the called party.<sup>3</sup>

14. According to findings by the FCC, the agency Congress vested with  
9 authority to issue regulations implementing the TCPA, such calls are prohibited because, as  
10 Congress found, automated or prerecorded telephone calls are a greater nuisance and invasion  
11 of privacy than live solicitation calls, and such calls can be costly and inconvenient. The FCC  
12 also recognized that wireless customers are charged for incoming calls whether they pay in  
13 advance or after the minutes are used.<sup>4</sup>

15. On January 4, 2008, the FCC released a Declaratory Ruling wherein it  
16 confirmed that autodialed and prerecorded message calls to a wireless number by a creditor (or  
17 on behalf of a creditor) are permitted only if the calls are made with the “prior express consent”  
18 of the called party.<sup>5</sup> The FCC “emphasize[d] that prior express consent is deemed to be granted  
19 only if the wireless number was provided by the consumer to the creditor, and that such number  
20 was provided during the transaction that resulted in the debt owed.”<sup>6</sup>

23  
24 <sup>2</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat.  
25 2394 (1991), codified at 47 U.S.C. § 227 (TCPA). The TCPA amended Title II of the  
Communications Act of 1934, 47 U.S.C. § 201 *et seq.*

25 <sup>3</sup> 47 U.S.C. § 227(b)(1)(A)(iii).

26 <sup>4</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of*  
*1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).

27 <sup>5</sup> *In the Matter of Rules and Regulations Implementing the Telephone Consumer*  
*Protection Act of 1991 (“FCC Declaratory Ruling”)*, 23 F.C.C.R. 559, 23 FCC Rcd. 559, 43  
28 Communications Reg. (P&F) 877, 2008 WL 65485 (F.C.C.) (2008).

<sup>6</sup> *FCC Declaratory Ruling*, 23 F.C.C.R. at 564-65 (¶ 10).

## **FACTUAL ALLEGATIONS**

16. At all times relevant, Plaintiff Mills was an individual residing in the State of California. Plaintiff Mills is, and at all times mentioned herein was, a "person" as defined by 47 U.S.C. § 153(39).

17. In or around 1998, Plaintiff Mills took out a credit card with HSBC. Plaintiff Mills did not provide the cellular phone number that HSBC called on his credit card application. In fact, Plaintiff Mills did not even have his current cellular phone number in 1998.

18. Plaintiff Mills has not subsequently provided Defendants with consent to contact him via his cellular phone number.

19. Beginning in or around April 2012 and through the present, HSBC has repeatedly contacted Plaintiff Mills on his cellular telephone with an automated message. Mills received repeated, harassing calls at all hours of the day. Because these calls were prerecorded, Mills had no ability to request that the calls end or to voice his complaints to a real person.

20. Although Plaintiff Mills attempted to request that Defendants stop the calls, HSBC has continued to call his cellular phone.

21. HSBC is, and at all times mentioned herein was, a “person”, as defined by 47 U.S.C. § 153(39).

22. All telephone contact by HSBC to Plaintiff on his cellular telephone occurred via an “automatic telephone dialing system,” as defined by 47 U.S.C. § 227(a)(1), and/or used “an artificial or prerecorded voice” as described in 47 U.S.C. § 227(b)(1)(A).

23. The telephone number that HSBC used to contact Plaintiff, with an “artificial or prerecorded voice” made by an “automatic telephone dialing system,” was assigned to a cellular telephone service as specified in 47 U.S.C. § 227(b)(1)(A)(iii).

24. “During the transaction that resulted in the debt owed,” Plaintiff did not provide express consent to receive prerecorded calls by HSBC on his cellular telephone.<sup>7</sup> Indeed, Plaintiff did not have a cellular telephone at the time of the transaction.

<sup>7</sup> See FCC Declaratory Ruling, 23 F.C.C.R. at 564-65 (¶ 10).

1                   25. Plaintiff did not provide “express consent” allowing HSBC to place  
2 telephone calls to Plaintiff’s cellular phone utilizing an “artificial or prerecorded voice” or  
3 placed by an “automatic telephone dialing system,” within the meaning of 47 U.S.C. §  
4 227(b)(1)(A).

5                   26.     HSBC did not make telephone calls to Plaintiff's cellular phone "for  
6 emergency purposes" utilizing an "artificial or prerecorded voice" or placed by an "automatic  
7 telephone dialing system," as described in 47 U.S.C. § 227(b)(1)(A).

8           27.     HSBC's telephone calls to Plaintiff's cellular phone utilizing an  
9     "artificial or prerecorded voice" or placed by an "automatic telephone dialing system" for non-  
10    emergency purposes and in the absence of Plaintiff's prior express consent violated 47 U.S.C. §  
11    227(b)(1)(A).

12                   28. Under the TCPA and pursuant to the FCC's January 2008 Declaratory  
13 Ruling, the burden is on HSBC to demonstrate that Plaintiff provided express consent within  
14 the meaning of the statute.<sup>8</sup>

15                   29. Any consumer arbitration clauses in the underlying credit card contracts  
16 with Plaintiff and the Class members are not enforceable or applicable to the claims here  
17 because HSBC has agreed, pursuant to a separate settlement agreement, not to enforce  
18 consumer arbitration clauses.

## CLASS ACTION ALLEGATIONS

20                   30. Plaintiff brings this action on behalf of himself and on behalf of all other  
21 persons similarly situated (hereinafter referred to as "the Class").

24 All persons within the United States who received a non-emergency  
25 telephone call from HSBC to a cellular telephone through the use of  
26 an automatic telephone dialing system or an artificial or  
prerecorded voice and who did not provide prior express consent  
for such calls during the transaction that resulted in the debt owed.

<sup>28</sup> See FCC Declaratory Ruling, 23 F.C.C.R. at 565 (¶ 10).

1 Collectively, all these persons will be referred to as "Class members." Plaintiff represents, and is  
 2 a member of, the Class. Excluded from the Class are HSBC and any entities in which HSBC has  
 3 a controlling interest, HSBC's agents and employees, any Judge to whom this action is assigned  
 4 and any member of such Judge's staff and immediate family, and claims for personal injury,  
 5 wrongful death and/or emotional distress.

6           32. Plaintiff does not know the exact number of members in the Class, but  
 7 based upon the representations of HSBC as to its market share, Plaintiff reasonably believes  
 8 that Class members number at minimum in the tens of thousands.

9           33. Plaintiff and all members of the Class have been harmed by the acts of  
 10 HSBC.

11           34. This Class Action Complaint seeks injunctive relief and money damages.

12           35. The joinder of all Class members is impracticable due to the size and  
 13 relatively modest value of each individual claim. The disposition of the claims in a class action  
 14 will provide substantial benefit to the parties and the Court in avoiding a multiplicity of  
 15 identical suits. The Class can be identified easily through records maintained by HSBC.

16           36. There are well defined, nearly identical, questions of law and fact  
 17 affecting all parties. The questions of law and fact involving the class claims predominate over  
 18 questions which may affect individual Class members. Those common questions of law and  
 19 fact include, but are not limited to, the following:

20           a. Whether HSBC made non-emergency calls to  
 21 Plaintiff and Class members' cellular telephones using an automatic  
 22 telephone dialing system or an artificial or prerecorded voice;

23           b. Whether HSBC can meet its burden of showing it  
 24 obtained prior express consent (*i.e.*, consent that is clearly and  
 25 unmistakably stated), during the transaction that resulted in the debt  
 26 owed, to make such calls;

27           c. Whether HSBC's conduct was knowing and/or willful;

28           d. Whether HSBC is liable for damages, and the amount of such  
 29 damages; and

30           e. Whether HSBC should be enjoined from engaging in  
 31 such conduct in the future.

1                   37. As a person who received numerous and repeated telephone calls using  
 2 an automatic telephone dialing system or an artificial or prerecorded voice, without his prior  
 3 express consent within the meaning of the TCPA, Plaintiff asserts claims that are typical of each  
 4 Class member. Plaintiff will fairly and adequately represent and protect the interests of the  
 5 Class, and has no interests which are antagonistic to any member of the Class.

6                   38. Plaintiff has retained counsel experienced in handling class action claims  
 7 involving violations of federal and state consumer protection statutes, including claims under  
 8 the TCPA.

9                   39. A class action is the superior method for the fair and efficient  
 10 adjudication of this controversy. Class wide relief is essential to compel HSBC to comply with  
 11 the TCPA. The interest of Class members in individually controlling the prosecution of  
 12 separate claims against HSBC is small because the statutory damages in an individual action for  
 13 violation of the TCPA are small. Management of these claims is likely to present significantly  
 14 fewer difficulties than are presented in many class claims because the calls at issue are all  
 15 automated and the Class members, by definition, did not provide the prior express consent  
 16 required under the statute to authorize calls to their cellular telephones.

17                  40. HSBC has acted on grounds generally applicable to the Class, thereby  
 18 making final injunctive relief and corresponding declaratory relief with respect to the Class as a  
 19 whole appropriate. Moreover, on information and belief, Plaintiff alleges that the TCPA  
 20 violations complained of herein are substantially likely to continue in the future if an injunction  
 21 is not entered.

22                  **CAUSES OF ACTION**

23                  **FIRST COUNT**

24                  **KNOWING AND/OR WILLFUL VIOLATIONS OF THE TELEPHONE**  
 25                  **CONSUMER PROTECTION ACT, 47 U.S.C. § 227 ET SEQ.**

26                  41. Plaintiff incorporates by reference the foregoing paragraphs of this  
 27 Complaint as if fully stated herein.

1                   42. The foregoing acts and omissions of HSBC constitute numerous and  
 2 multiple knowing and/or willful violations of the TCPA, including but not limited to each of the  
 3 above-cited provisions of 47 U.S.C. § 227 *et seq.*

4                   43. As a result of HSBC's knowing and/or willful violations of 47 U.S.C. §  
 5 227 *et seq.*, Plaintiff and each member of the Class is entitled to treble damages of up to  
 6 \$1,500.00 for each and every call in violation of the statute, pursuant to 47 U.S.C. § 227(b)(3).

7                   44. Plaintiff and all Class members are also entitled to and do seek injunctive  
 8 relief prohibiting such conduct violating the TCPA by HSBC in the future. Plaintiff and Class  
 9 members are also entitled to an award of attorneys' fees and costs.

10                   **SECOND COUNT**

11                   **VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT 47 U.S.C. § 227**  
 12                   **ET SEQ.**

13                   45. Plaintiff incorporates by reference the foregoing paragraphs of this  
 14 Complaint as if fully set forth herein.

15                   46. The foregoing acts and omissions of HSBC constitute numerous and  
 16 multiple violations of the TCPA, including but not limited to each of the above cited provisions  
 17 of 47 U.S.C. § 227 *et seq.*

18                   47. As a result of HSBC's violations of 47 U.S.C. § 227 *et seq.*, Plaintiff and  
 19 Class members are entitled to an award of \$500.00 in statutory damages for each and every call  
 20 in violation of the statute, pursuant to 47 U.S.C. § 227(b)(3)(B).

21                   48. Plaintiff and Class members are also entitled to and do seek injunctive  
 22 relief prohibiting HSBC's violation of the TCPA in the future.

23                   49. Plaintiff and Class members are also entitled to an award of attorneys'  
 24 fees and costs.

25                   **PRAYER FOR RELIEF**

26                   WHEREFORE, Plaintiff respectfully requests that the Court grant Plaintiff and all  
 27 Class members the following relief against Defendant:

28                   A. Injunctive relief prohibiting such violations of the TCPA by HSBC in the

1 future;

2 B. As a result of HSBC's willful and/or knowing violations of 47 U.S.C.  
3 § 227(b)(1), Plaintiff seeks for himself and each Class member treble damages, as provided by  
4 statute, of up to \$1,500.00 for each and every call that violated the TCPA;

5 C. As a result of HSBC's violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks  
6 for himself and each Class member \$500.00 in statutory damages for each and every call that  
7 violated the TCPA;

8 D. An award of attorneys' fees and costs to counsel for Plaintiff and the Class;

9 E. An order certifying this action to be a proper class action pursuant to  
10 Federal Rule of Civil Procedure 23, establishing an appropriate Class and any Subclasses the  
11 Court deems appropriate, finding that Plaintiff is a proper representative of the Class, and  
12 appointing the lawyers and law firms representing Plaintiff as counsel for the Class;

13 F. Such other relief as the Court deems just and proper.

14  
15 Dated: August 3, 2012

By: /s/ Jonathan D. Selbin  
16 Jonathan D. Selbin

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Attorneys for Plaintiff Mills and the Proposed Class

**DEMAND FOR JURY TRIAL**

Plaintiff demands a trial by jury on all counts so triable.

Dated: August 3, 2012

By: /s/ Jonathan D. Selbin  
Jonathan D. Selbin

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